MINISTER OF FINANCE & ORS
v. NATSTEEL HOLDINGS PTE LTD

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
SEE MEE CHUN JCA
WAN AHMAD FARID SALLEH JCA
[CIVIL APPEAL NO: W-01(A)-623-10-2021]
3 DECEMBER 2024

Abstract – *The Investigation Authority's ('IA') long-standing practice of disclosing the details, breakdown and computation of the normal value and dumping margin carries no legal force, as no provision under the WTO Agreement on the Implementation of Article VI of GATT 1 requires such disclosure. Consequently, a claim of legitimate expectation cannot be based merely on the IA's past practices but must rest on a clear and specific promise or undertaking made to the affected party.*

CIVIL PROCEDURE: *Appeal – Appeal against judgment of High Court – High Court allowed judicial review application to quash decision of Minister of Finance and recommendation by Minister of International Trade and Industry – Singaporean exporter ('exporter') of steel concrete reinforcing bars imposed with anti-dumping duties – Whether High Court's decision warranted appellate intervention – Whether past practices of Trade Practices Section of Ministry of International Trade and Industry had force of law – Whether there was breach of principles of natural justice and legitimate expectation of exporter – Rules of Court 2012, O. 53 r. 3(1) & (2)*

The respondent, a Singaporean company, was a producer and exporter of steel concrete reinforcing bars ('rebar') to Malaysia. Following a petition by the Malaysia Steel Association ('MSA') requesting an anti-dumping investigation into rebar products exported from, among others, the Republic of Singapore, the third appellant, the Minister of International Trade and Industry, initiated the investigation by issuing and publishing a notice of initiation in the Government *Gazette*. Pursuant to that notice, the respondent submitted its response to the Foreign Producer's and Exporter's Questionnaire. Based on the respondent's submission, and as the third appellant had delegated its investigative powers to the Trade Practices Section of the fourth appellant, the Ministry of International Trade and Industry (Investigation Authority) ('IA'), the IA prepared and submitted a report containing its findings and preliminary determination ('preliminary determination report') on the alleged dumping of rebar products from Singapore. Following this, the seventh appellant, the Government of Malaysia, made an affirmative preliminary determination of dumping and injury, which resulted in the continuation of the investigation. Consequently,

provisional anti-dumping duties were imposed on the respondent by the first appellant. In response, the respondent submitted its comments on the preliminary determination report. Subsequently, the IA conducted a verification visit to the respondent's premises. Thereafter, the IA presented the essential facts under consideration, which formed the basis for the final determination of whether to impose definitive measures, and provided all interested parties, including the respondent, an opportunity to defend their interests. This prompted the respondent to seek clarification from the IA, by way of a letter, regarding the numerical breakdown and explanation used to calculate the dumping margin. The IA subsequently finalised its findings and submitted them to the third appellant, who, in turn, made a recommendation to the first appellant. The seventh appellant thereafter issued its affirmative final determination on the matter. Following that determination, the first appellant imposed anti-dumping duties on the respondent at a rate of 4.97% for rebar products exported by the respondent, effective from 22 January 2020 to 21 January 2025. Aggrieved, the respondent filed a judicial review application under O. 53 r. 3(1) of the Rules of Court 2012 ('ROC') at the High Court, seeking a *certiorari* order to quash: (i) the decision of the first appellant; and (ii) the recommendation made by the third appellant to the first appellant. The High Court, in allowing the application, held that: (i) the appellants, by suddenly departing from their long-established practice of setting out the details, breakdown, and computation as to how the normal value and dumping margin were calculated – without first notifying the respondent – had failed to act with procedural fairness, thereby breaching the principles of natural justice and the respondent's legitimate expectation; (ii) pursuant to arts. 12 and 6.9 of the WTO Agreement on the Implementation of Article VI GATT 1 ('WTO Agreement'), it was mandatory for the appellants to disclose the said breakdown and computation; (iii) the IA's construction of the normal value was incorrect and unjustifiable because it had accounted for an unrealistically high profit margin of 4.75%, when the gross profit margins of commodity steel products such as rebar were only between 3% and 4%; and (iv) the IA's finding that the imports had caused injury to the domestic industry due to price suppression was upheld. Hence, the present appeal by the appellants against the High Court's decision. The issue that arose was whether appellate intervention ought to be exercised with respect to the High Court's decision.

Held (allowing appeal)

Per Wan Ahmad Farid Salleh JCA delivering the judgment of the court:

(1a) Although arts. 12.2 and 6.9 of the WTO Agreement had not been complied with, there was no provision in the said agreement that made it mandatory for the appellants to provide the actual mathematical determination. Furthermore, it was inaccurate for the High Court to suggest that the IA had merely provided the dumping margin. In Part D of the preliminary determination report and Part E of the notice of

essential facts, the IA explained how it arrived at the finding that 80.79% of the volume of sales of the like product in the domestic market had been made below cost throughout the period of investigation ('POI'). The IA also explained the methodology used in determining the normal value and the data selected for the purpose of determining the percentage of sales below cost in the domestic market during the POI, whereby it selected sales to all domestic customers based on the same product codes sold to Malaysia during the POI. (paras 24, 29 & 30)

(1b) In the preliminary determination report and the notice of essential facts, the appellants explained that, among others: (i) the normal value had been constructed by the IA by referring to the cost of production plus a reasonable amount for sales, general and administrative expenses ('SG&A') and profit margin; and (ii) in arriving at the constructed normal value of SGD816.49, the IA had taken the cost of production plus a reasonable amount for SG&A and profit margin as stated in the respondent's foreign exporter's questionnaire. The High Court therefore erred in concluding that the IA had taken into consideration a profit margin of 4.75% in constructing the normal value. On the contrary, the IA applied the profit margin supplied by the respondent in its foreign exporter's questionnaire, whereby the profit margin that the respondent had set during the POI was 4%. (paras 31 & 32)

(2) Before issuing the final determination, the respondent had been afforded the opportunity to be heard as required under the Countervailing and Anti-Dumping Duties Act 1993 through various means, such as: (i) the foreign exporter's questionnaire, which was provided following the presentation of the petition by the MSA; and (ii) the respondent's invitation to comment on the preliminary determination report and the notice of essential facts before the final determination report was prepared by the IA. In view of these opportunities, there was no breach of natural justice by the IA or the appellants. (paras 33 & 34)

(3) The argument on breach of legitimate expectation had not been raised by the respondent in the statement made under O. 53 r. 3(2) of the ROC. At best, it had been raised in an affidavit in support affirmed by one "Mr Lim", only by way of allusion. No breach of legitimate expectation had been expressly mentioned in the affidavit. Two points were to be noted here. Firstly, the previous practice of the IA had no force of law. Secondly, even if the breach of legitimate expectation had been clearly pleaded in the statement and positively asserted in the affidavit, there must have been evidence of a promise or undertaking

made by the appellants to that effect. The past practices of the IA in other unrelated notices of affirmative preliminary determination, notices of essential facts, and final determinations, if any, could hardly be construed as a specific undertaking by the IA to the respondent in relation to rebar. These matters were unrelated. (paras 36-39)

(4) As to the findings of injury and causal link by the High Court, these were not among the grounds raised in the statement made under O. 53 r. 3(2) of the ROC. Therefore, the High Court committed an error of law when it decided on issues not pleaded in the grounds of the application as reflected in the statement under O. 53 r. 3(2) of the ROC. (para 40)

(5) There were merits in the appeal that warranted the court's appellate intervention. Accordingly, the High Court's decision was set aside, with costs of RM15,000. (paras 42 & 43)

Case(s) referred to:

Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Perlindungan Hidupan Liar Dan Taman Negara & Ors v. Mariani Ramli [2021] 9 CLJ 695 CA ***(refd)***

Zakiah Ishak v. Majlis Daerah Hulu Selangor [2005] 4 CLJ 77 CA ***(refd)***

Legislation referred to:

Countervailing and Anti-Dumping Duties Act 1993, ss. 4, 16(2), 20, 23, 24(2), 25(2), (2A), (4), (5), 30(3), (4)
Countervailing and Anti-Dumping Regulations 1994, reg. 26
Customs Act 1967, s. 11(1)
Rules of Court 2012, O. 53 r. 3(1), (2)

For the appellants - Kogilambigai Muthusamy; AG's Chambers
For the respondent - Ho Pui Yan & Manshan Singh; M/s Skrine

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Appeal No: W-01(A)-623-10-2021 (overruled).]

Reported by Syamim Ariffin

JUDGMENT

Wan Ahmad Farid Salleh JCA:

Factual Background

[1] This is an appeal against the decision of the learned High Court Judge in allowing Natsteel Holdings Pte Ltd's ("Natsteel") application for judicial review to quash the imposition of anti-dumping duties at the rate of 4.97% on rebar originating or exported by the respondent from the Republic of Singapore from 22 January 2020 to 21 January 2025.

[2] The parties will be referred to as they are in the instant appeal.

[3] The respondent is a company incorporated under the laws of the Republic of Singapore that produces and supplied steel products and services to the construction industry and is the producer and exporter of steel concrete reinforcing bars to Malaysia.

[4] The first appellant is the Minister of Finance, of the second appellant, who imposed anti-dumping duties at the rate of 4.97% on rebar products originating or exported from Natsteel of the Republic of Singapore from 22 January 2020 to 21 January 2025.

[5] The third appellant is the Minister of International Trade and Industry of the fourth appellant.

[6] The fifth appellant is the Director General of the sixth appellant.

[7] The sixth appellant is the Royal Malaysian Customs Malaysia who is tasked to collect the anti-dumping duties imposed on imports of rebar products originating or exported from Natsteel from 22 January 2020 to 21 January 2025, on behalf of the seventh appellant.

[8] The seventh appellant is the Government of Malaysia.

Chronology Of Events

[9] On 29 March 2019, the Malaysia Steel Association ("MSA") submitted a petition pursuant to ss. 4 and 20 of the Countervailing and Anti-Dumping Duties Act 1993 (Act 504) requesting initiation of an anti-dumping investigation on steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation ("rebar") originated or exported from the Republic of Singapore and the Republic of Turkey.

[10] Pursuant thereto, on 26 April 2019, the third appellant initiated the rebar anti-dumping duties ("AD") investigation by issuing and publishing a notice of initiation in the Government Gazette No. PU(B) 211/2019.

[11] The third appellant then delegated his investigative power to the trade practices section of the fourth appellant ("investigation authority" (IA)).

[12] Natsteel then provided its response to the foreign producer's and exporter's questionnaire.

[13] A report containing the IA's finding relating to the preliminary determination ("preliminary determination report") on the alleged dumping of the steel concrete reinforcing bar from Singapore and Turkey was submitted to the third appellant pursuant to s. 30(3) of Act 504.

[14] Thereafter, the Government made an affirmative preliminary determination of dumping and injury resulting in the continuance of the investigation and a notice of affirmative preliminary determination of an anti-dumping duty investigation pursuant to s. 23 of Act 504.

[15] The affirmative preliminary determination also resulted in the imposition of provisional anti-dumping duties towards the respondent as a provisional measure pursuant to s. 24(2) of Act 504 which was carried out by the first appellant.

[16] The respondent submitted its comments to the preliminary determination report and verification visit was carried out by the IA at the foreign producer's premises.

[17] The IA submitted the essential facts under consideration that form the basis for the final determination whether to apply definitive measures and gave all interested parties including the respondent time to defend its interest pursuant to s. 25(2) and (2A) of Act 504.

[18] The respondent by way of letter dated 23 December 2019 sought explanation from the IA with respect to the numerical breakdown and explanation in arriving at the dumping margin and gave its comments to the notice of essential facts report on 27 December 2019.

[19] A finding was made by the IA and submitted to the third appellant pursuant to s. 30(3) of Act 504 who shall give his recommendation to the first appellant pursuant to s. 30(4) of Act 504.

[20] The Government made an affirmative final determination pursuant to s. 25(4) of Act 504. Pursuant to s. 25(5) of Act 504 read together with s. 11(1) of Customs Act 1967 (Act 235) the Government *via* the Ministry of Finance imposed anti-dumping duties at the rate of 4.97% on rebar products originating or exported from respondent from 22 January 2020 to 21 January 2025.

At The High Court

[21] The respondent then filed a judicial review application under O. 53 r. 3(1) of Rules of Court 2012 ("ROC 2012") to seek for a *certiorari* order to quash the following impugned decisions:

(i) the first appellant's (Minister of Finance) decision to impose anti-dumping duties at the rate of 4.97% on rebar originating or exported from the applicant of the Republic of Singapore from 22 January 2020 to 21 January 2025 as set out in the Customs (Anti-Dumping Duties) Order 2020 following the recommendation or proposal of the third appellant arising from an anti-dumping duty investigation with regard to the imports of rebar originating or exported from the Republic of Singapore and the Republic of Turkey; and

(ii) the third appellant's decision and/or recommendation to impose anti-dumping duties at the rate of 4.97% on rebar originating or exported from the respondent of the Republic of Singapore as set out in the notice of affirmative final determination and the final determination report of

an anti-dumping duty investigation with regard to the imports of rebar originating or exported from the Republic of Singapore and the Republic of Turkey both dated 21 January 2020 and 7 January 2020 respectively.

[22] The learned judge, with whom learned counsel for the respondent deferred, made the following findings:

(i) the appellants, suddenly departing from their long-established practice, had unjustifiably withheld from Natsteel the details, breakdown and computation of how the normal value and dumping margin were calculated. According to the learned judge, IA had failed to act with procedural fairness and had breached the principles of natural justice by departing, without prior public notification of the change, from its long-established practice of providing details, breakdown and computation of normal value and dumping margin to exporters subject to anti-dumping duties. There is therefore a breach of legitimate expectation;

(ii) it is mandatory for the appellants to disclose the details, breakdown and computation of how the normal value and dumping margin were calculated pursuant to arts. 12 and 6.9 of the WTO Agreement on the implementation of article VI GATT 1 ("Anti-Dumping Agreement"), and the appellants' continuous refusal to do so amounts to a breach of the principles of natural justice;

(iii) the IA's construction of normal value is incorrect and cannot be justified because the IA had accounted for an unrealistically high profit margin of 4.75% – when gross profit margins of commodity steel products such as the rebar products are only between 3% to 4%; and

(iv) the IA's finding that the imports had caused injury to the domestic industry due to price suppression.

At The Court Of Appeal

[23] Let us begin by highlighting the requirements of arts. 12.2 and 6.9 of the WTO Anti-Dumping Agreement. By art. 12.2, the appellants are required to provide all relevant information on the matters of fact and law and reasons which have led to the imposition of the final measures. Article 6.9 requires the authorities, before final determination, to inform all parties of the essential facts under consideration, which form the basis for the impugned decision on whether to apply the definitive measures.

[24] Have the provisions in the two relevant articles been complied with? The learned judge answered this in the negative. However, we do not find any provision in the WTO Anti-Dumping Agreement which makes it mandatory for the authorities to provide actual mathematical determination.

[25] In the instant appeal, the appellants had issued the preliminary determination report – anti-dumping investigation dated 5 September 2019, and the notice of essential facts dated 23 December 2019.

[26] Natsteel, through its solicitors, Messrs Skrine, requested the breakdown of the calculations of the constructed normal value from the IA. In reply, the fourth appellant, MITI, stated that in determining the dumping margin, the calculation made by the IA was based on the information provided by Natsteel. A dumping margin is the difference between the normal value of a product and its export price, expressed as a percentage of the export price.

[27] More importantly, learned counsel submitted that, during the IA's verification visit at Natsteel's premises in Singapore, Natsteel requested the IA for the breakdown and methodology on the constructed normal value and how IA derived Natsteel's assets below the costs of the like product represented 80.79%. A constructed value in the country of origin, is the cost of production in the country of origin, plus a reasonable amount for administrative and selling costs and margin of profits.

[28] This was refused, which, according to Natsteel, is against art. 12.2.1 of the WTO Anti-Dumping Agreement.

[29] Before us, the learned FC contended that the IA, *via* part F of the preliminary determination report dated 5 September 2019 ("PD report") and also part E of the notice of essential facts dated 23 December 2019 had provided sufficient explanation on how the IA arrived at a finding that 80.79% of the volume of sales of the like product in the domestic market was made below cost throughout the period of investigation ("POI").

[30] In our view, it is not accurate to suggest, as the learned judge did, that the IA had merely provided the dumping margin. We note in part D of the PD report and part E of the notice of essential facts that the IA had explained how it arrived at a finding that 80.79% of the volume of sales of the like product in the domestic market was made below-cost throughout the POI. Moreover, the IA had explained the methodology used in determining normal value. It had also explained the data that had been selected for the purposes of determining the percentage of sales below the cost of the like product in the domestic market throughout the POI, whereby the IA had selected sales to all domestic customers based on the same product codes sold to Malaysia during the POI.

[31] We also take cognisance that both the PD report and notice of essential facts explained that:

(i) the normal value had been constructed pursuant to s. 16(2) of the Countervailing and Anti-Dumping Duties Act 1993 (the "Anti-Dumping Act") and reg. 26 of the Countervailing and Anti-Dumping Regulations 1994 and art. 2.2. of the WTO Anti-Dumping Agreement;

(ii) the normal value had been constructed by the IA by referring to the cost of production plus a reasonable amount for Sales, General and Administrative Expenses ("SG&A") and profit margin; and

(iii) in the instant case, in arriving at the constructed normal value of SGD816.49, the IA had taken the cost of production plus a reasonable amount for SG&A and profit margin as stated in the respondent's foreign exporter's questionnaire.

[32] The IA had referred to the cost of production and the reasonable amount for SG&A and the profit margin. In our view, the learned judge had erred in concluding that the IA had taken into consideration a profit margin of 4.75% in constructing the normal value. On the contrary, the IA had applied the profit margin as supplied by the respondent in the respondent's foreign exporter's questionnaire, whereby the margin profit that the respondent had set during the period of investigation is at the rate of 4%.

[33] Was the respondent denied the right to be heard by the IA before it arrived at its final determination? We do not think so. We take note that before the final determination was made, the respondent had been given the opportunity to be heard as required under the Anti-Dumping Act through various means. They are as follows:

(i) foreign exporter's questionnaire, upon a petition being presented by Malaysia Steel Association; and

(ii) the respondent was also invited to comment on the PD report and the notice of essential facts before the IA prepared the final determination report.

[34] Having appraised these facts, we do not think that there was a breach of natural justice on the part of the IA and the Appellants.

[35] Before us, learned counsel for the respondent submitted that the appellants had departed from their long-established practice in unjustifiably withholding the details, breakdown and computation of how normal value was constructed and their calculation of the dumping margin. There was therefore a breach of legitimate expectation.

[36] This argument on breach of legitimate expectation was not raised by the respondent in the statement made under O. 53 r. 3(2) of the ROC 2012. At best, it was raised in para 33 by the affidavit in support affirmed by Mr Lim Siew Har. Mr Lim alluded to the fact that the previous practice of IA was to provide detailed calculations regarding galvanized iron coils/sheet or galvanised steel coils/sheets originating or exported from the People's Republic of China and the Socialist Republic of Vietnam. There was, however, no mention of a breach of legitimate expectation in the affidavit in support.

[37] There are two things to be noted here. First, the previous practice of IA has no force of law.

[38] Secondly, even if the breach of legitimate expectation is clearly pleaded in the statement and positively asserted in the affidavit in support of Mr Lim, for it to arise, there must be evidence of a promise or undertaking made by the appellants to that effect; see *Zakiah Ishak v. Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77; [2005] 6 MLJ 517.

[39] We are of the view that the past practices of the IA on other unrelated notice of affirmative preliminary determination, notice of essential facts and final determination, if at all, can hardly be construed as a specific undertaking made by the IA to the respondent on the issue of rebar. They are unrelated.

[40] As to the findings of injury and causal link by the learned judge, again, this was not one of the grounds raised in the statement made under O. 53 r. 3(2) of the ROC 2012. The law can be found in the judgment of the Court of Appeal in *Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan Perlindungan Hidupan Liar Dan Taman Negara & Ors v. Mariani Ramli* [2021] 9 CLJ 695; [2021] 5 MLJ 857. It was held that the learned judge had committed an error of law when he decided on issues not pleaded in the grounds of the application as reflected in the statement under O. 53 r. 3(2) of the ROC 2012.

Conclusion

[41] For the aforesaid reasons, we would therefore make the following findings:

(i) the so-called long-established practice of the IA has no force of law that binds the appellants in any way. In the circumstances, the alleged failure to provide the details, breakdown, and computation of how the normal value and dumping margin were calculated, if at all, should not be legitimate grounds for judicial review. In the same breath, there is therefore no breach of legitimate expectation;

(ii) the IA had sufficiently explained the methodology used in determining normal value. The data that had been selected for the purposes of determining the percentage of sales below the cost of the like product in the domestic market throughout the POI had also been sufficiently disclosed. Before the final determination was made, the respondent had been given the opportunity to be heard. There was, therefore, no breach of the principles of natural justice;

(iii) the IA's construction of normal value is correct and justifiable because the IA had applied the profit margin as supplied by the respondent in the respondent's foreign exporter's questionnaire response. The profit that had been set by the respondent during the period of investigation was at the rate of 4%; and

(iv) the learned judge had erred in considering the issue that the imports had caused injury to the domestic industry due to price suppression when it was not pleaded in the statement made under O. 53 r. 3(2) of the ROC 2012.

[42] The learned judge failed to consider the relevant case laws on the subject and to analyse the issues before him prior to arriving at his conclusion in allowing the respondent's application for judicial review. For all the foregoing reasons, we find there are merits in the appeal which compelled us to exercise our appellate intervention.

[43] The appeal is allowed and the order of the High Court is set aside with costs of RM15,000.